PROVINCE OF NOVA SCOTIA
COUNTY OF YARMOUTH
1993 CY # 6761

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

Appellant,

- versus -

DAVID WILLIAM CLAYTON

Respondent.

HEARD: At Yarmouth, in the County of Yarmouth, Nova Scotia on the 13th day of May, A.D., 1993

BEFORE: The Honourable Mr. Justice C. E. Haliburton, JSC

CHARGE: C.C. Section 253(b)

DECISION: On the 13th day fo May, A.D., 1993

COUNSEL:

R.M.J. Prince, Esq., Crown Attorney - for the Appellant

P. J. Star, Esq., on behalf of the Respondent

- D E C I S I O N -

HALIBURTON, J. (Orally)

This is the appeal of the Crown against the acquittal of **David William Clayton** on a charge that at or near Yarmouth, on or about the 1st day of March, 1992 he did, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did operate a motor vehicle contrary to **Section 253(b) of the Criminal Code.**

This matter has been around for some time, as I recall. The trial was in September of '92; the decision was in December of 1992. There was an application to dismiss the appeal on some special technical grounds earlier on. The decision on that was reserved and eventually the court indicated to counsel that that argument was without merit, and accordingly the appeal was set for hearing.

There were several grounds of appeal but today it boils down to a question of whether or not there is an unexplained delay between the second and third breathalyzer tests which were administered to the accused. The Crown's position is attractive that it is a question of fact for the trial judge to make as to whether or not there was an unexplained delay. The issue was left with the trial judge by defence counsel at the time of the original hearing. Unfortunately the trial judge, in delivering his decision, for some reason whether he thought he had found some other overriding reason to acquit the accused or whether he had considered and rejected that proposition of defence counsel, didn't indicate it in his decision. He did, in his decision, acquit the accused on a separate basis, which I think perhaps was raised by defence counsel in his argument, but

which the typed transcript discloses was not correct. The trial judge then did not address the specific issue which has been raised today.

Defence counsel has put before the court a decision which I rendered in the case of **Luc Trempe, Appellant against Her Majesty The Queen** in a decision that was rendered on the 20th of January, 1992, wherein I concluded that an unexplained delay of thirty-two minutes automatically entitled the accused in that case to an acquittal. In that case, to be sure as Crown counsel points out here, there was, and I would highlight **'no evidence'** as to the reason for that delay. It is certainly less clear in this case that there is no evidence because there is quite patently some evidence about what it was that the police officer did between 3:03 in the morning on the day in question, when the first test was performed and 3:35 when the second test was performed.

Usually, the argument of delay arises before the test, when there is a lack of explanation about how far the officer was from the police detachment and that kind of thing.

This is an unusual case in that the delay occurred between two tests. The delay, it's obvious from the transcript, occurred between the two tests because of a malfunction or an inappropriate reading registered by the machine. The policeman aborted the testing process after the first test, after a control process had indicated that there was a malfunction, and he started all over again. How much of the delay was involved in making his decision to abort the first testing process and start again is not disclosed in the evidence. Whether it would take two minutes to purge the machine, put in a new ampule and take a further test, or whether it would take fifteen min-

utes to do that, or some other length of time, is not established. It clearly would take some time but how much time is not explained. The **Trempe Case** then is obviously not quite on all fours with this case. Defence counsel makes the further submission in those circumstances that the Crown had the opportunity to prove what caused the delay or how much of a delay was caused the first time around, and they ought not to have the second 'kick at the can', as we like to say.

In all the circumstances of this case I'm in sympathy with that proposition. The trial judge, for the reasons that he enumerated and for whatever reasons, determined to acquit the accused. I don't know whether the circumstances of the offence influenced that decision or not. It is clear that the blood-alcohol readings were in the range of a hundred milligrams when they were registered, a hundred milligrams of alcohol per one hundred millilitres of blood. The circumstances in which the accused was apprehended were not circumstances of a particularly flagrant or frightening situation. I suppose all those observations are irrelevant to the actual test that Judge Reardon was obliged to impose or certainly irrelevant to the test which I'm obliged to impose, but we do live and work by the adversarial system in this process. The Crown is not normally entitled to hold two trials in order to perfect their case. In this particular case it was not perfected the first time around. I'm not convinced that it's a circumstance in which I ought to order a new trial, which would be the only alternative.

Accordingly, the appeal is dismissed.

Haliburton, J.

Dated at Yarmouth, in the County of Yarmouth, Nova Scotia on the 19th day of May, A.D., 1993.

TO:

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